

In Re:

CITY OF PORTSMOUTH, NEW HAMPSHIRE)	TENTATIVE DECISION
PUBLICLY OWNED TREATMENT WORKS,)	OF THE REGIONAL
APPLICATION FOR SECTION 301(h))	ADMINISTRATOR PURSUANT TO
VARIANCE FROM THE SECONDARY)	40 CFR PART 125, SUBPART G
TREATMENT REQUIREMENTS OF THE)	
CLEAN WATER ACT)	
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The City of Portsmouth, NH, submitted a waiver application pursuant to Section 301(h) of the Clean Water Act, as amended by the Water Quality Act of 1987. EPA reviewed the merits of the application and, on February 7, 2005, made a “tentative approval” decision regarding the section 301(h) modified permit application. EPA issued a draft permit based on primary treatment, a fact sheet explaining the basis for the draft permit conditions, and a tentative decision document which presented the Agency’s analysis of the 301(h) waiver application. EPA opened a public comment period on the draft permit and the supporting documentation on February 14, 2005. EPA received at least two requests for a public hearing relative to the above-referenced matter.

EPA held a public hearing at the Portsmouth City Hall on May 9, 2005. The public comment period ended shortly thereafter. EPA received numerous comments on the draft permit and its supporting documents from several commenters. Significantly, one commenter raised objection to the issuance of the modified 301(h) draft permit to the City based on whether, in light amendments to Section 301(h) of the Clean Water Act contained in the Water Quality Act of 1987, issuance of a 301(h) waiver is legally permissible in this case. EPA’s response to this comment forms the basis of this tentative denial decision and is discussed further below.

In 1987, Congress amended Section 301(h) of the Clean Water Act by adding the following prohibition:

No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant’s current or proposed discharge.

The discharge of the Peirce Island Treatment Plant’s effluent is into “saline estuarine waters” as defined by regulations outlining the criteria for modifying the secondary treatment requirements

under section 301(h) of the Clean Water Act (see definition at 40 CFR Section 125.58 and “301(h) Waiver Renewal Application, Part II.B.1”). Therefore, pursuant to the above referenced 1987 Clean Water Act amendments, and EPA’s implementing regulations at 40 CFR § 125.59(b)(4), the City of Portsmouth is ineligible for authorization to discharge pollutants under section 301(h) of the CWA into the lower Piscataqua River if the river does not meet the above referenced conditions (i.e., does not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or exhibits ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses).

Further, as specified in the second sentence of the above referenced prohibition, EPA’s decision on the 301(h) modified permit application must be made without regard to the presence or absence of a causal relationship between such characteristics and the applicant’s current or proposed discharge. (See 56 Fed. Reg. 2814, “No permits may be issued for discharges into estuarine waters which exhibit certain specified stressed conditions, without regard to whether the applicant’s discharge is causing or will cause those conditions.” See also id. at 2821, “WQA section 303(e) makes clear that discharges into stressed estuary waters are prohibited in all cases, without regard to whether the stressed conditions are caused by the applicant’s discharge.”). The above referenced prohibition is further confirmed on EPA’s website relative to the Section 301(h) program which states “POTWs discharging into a stressed saline estuary or the New York Bight Apex are not eligible for a 301(h) waiver.” (See www.epa.gov/owow/oceans/discharges/301h.html).

The State of New Hampshire’s final 2004 list of “threatened or impaired waters” includes a listing for the Piscataqua River. This listing was developed pursuant to section 303(d) of the Clean Water Act which requires that States develop lists of waters where existing, required pollution controls are not stringent enough to allow the waters to attain their designated uses and all applicable water quality standards. The list identifies each impaired waterbody segment and the pollutants causing or expected to cause excursions of applicable water quality standards.

The section 303(d) list identifies the “lower” Piscataqua River (classified as an estuary, assessment unit identification NHEST600031001-02) as not supporting primary contact recreation as a result of Enterococcus bacteria; not supporting fish consumption as a result of polychlorinated biphenyls (PCBs) and mercury; not supporting shellfishing because of dioxin, PCBs, and mercury. The Peirce Island treatment plant discharges directly into the assessment unit designated as the “lower” Piscataqua River.

Additionally, other estuarine assessment units in the general vicinity of Portsmouth’s discharge are also listed as impaired. These assessment units include the “back channel” (NHEST600031001-05) and “upper Portsmouth Harbor” (NHEST60003001-11). The section 303(d) lists identifies these assessment units as not supporting fish consumption as a result of polychlorinated biphenyls (PCBs) and mercury; and not supporting shellfishing because of dioxin, PCBs, and mercury. The “back channel” is also identified as not supporting primary contact recreation due to Enterococcus

bacteria from unpermitted discharges (a failing septic system which discharges untreated domestic waste). Therefore, the saline estuarine waters into which the City's effluent directly discharges or which are reasonably affected by the discharge (depending on tidal conditions) are not supporting their designated uses because of at least four impairments.

Based on the preceding, it is my tentative decision that the City of Portsmouth be denied a 301(h) waiver from secondary treatment standards.

Pursuant to the procedures of the NPDES Permit Regulations, 40 CFR Part 124, a public notice will be issued including the comment procedures that are available to interested persons in regard to this decision and its accompanying draft NPDES permit.

Date: _____

Robert W. Varney
Regional Administrator
Environmental Protection Agency
Region I